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Toward Dignity in the Workplace: Miller-Wohl and Beyond

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TOWARD DIGNITY IN THE WORKPLACE: *MILLER-WOHL* AND BEYOND[1]

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The starting point for sex discrimination analysis in Montana should always be the sweeping "dignity clause" of the 1972 Montana Constitution: "The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state, nor any person, firm, corporation, or institution shall discriminate . . . on account of . . . sex."[2] Unique in its reach to private as well as state action,[3] the clause inextricably binds freedom from sex discrimination with equality and inviolable human dignity. In the two years following passage of the Montana Constitution, the legislature enacted both remedies for sex discrimination in employment[4] and special programs for women in employment[5]

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1. Research for this comment benefited greatly from the suggestions of Bari R. Burke, Associate Professor of Law, University of Montana Law School. The comments of Margery H. Brown, Professor of Law, University of Montana Law School; Joan Jonkel, J.D., University of Montana, 1978; and Thomas P. Huff, Professor of Philosophy and Lecturer in Law, University of Montana, were also most helpful. Any errors or omissions, however, are the author's alone.

2. MONT. CONST. art. II, § 4. *See* Comment, *The Montana Constitution: Taking New Rights Seriously, Equal Rights, (Part II)*, 39 MONT. L. REV. 221, 238-48 (1978) and Comment, *Equality for Men and Women, Three Approaches: Frontiero, the Equal Rights Amendment, and the Montana Equal Dignities Provision*, 35 MONT. L. REV. 325 (1974) (authored by Joan Uda) for valuable discussions of women's rights and the constitution's equal dignity clause.

3. *Taking New Rights Seriously, supra* note 2, at 239-40.

4. MONT. CODE ANN. § 49-2-303(1)(a) (1987) provides:

> (1) It is an unlawful discriminatory practice for: (a) an employer to refuse employment to a person, to bar him from employment, or to discriminate against him in compensation or in a term, condition, or privilege of employment because of his . . . sex when the reasonable demands of the position do not require . . . [a] sex distinction . . . .

5. MONT. CODE ANN. §§ 39-7-101 to -104 (1987) establishes a detailed affirmative program within the Department of Labor and Industry to promote employment of women in Montana. Specifically, MONT. CODE ANN. § 39-7-103 provides:

> The Department of Labor and Industry shall: (1) conduct studies about the changing employment needs and problems of women in Montana and make recommendations to the governor and the legislature; (2) direct public attention to critical employment problems confronting women as wives, mothers, homemakers, and workers; (3) serve as a clearinghouse for information and materials pertinent to programs and services available to assist and advise women on employment and related matters; (4) cooperate with governmental departments and agencies primarily involved in curbing job discrimination and in the expansion of employment rights and opportunities available to the women of this state; (5) conduct periodic conferences throughout the state to make women more aware of employment opportunities, programs, and services available to them; (6) serve as the central, permanent agency for the coordination and evaluation of employment programs and

designed to implement the new constitutional mandate.[6] The Montana Maternity Leave Act[7] was the most far-reaching of the legislative enactments. Though the legislature passed these remedies for sex discrimination in employment under the Montana Constitution's dignity clause, the Montana Supreme Court has adopted and followed federal discrimination analysis when reviewing Montana cases arising under Montana law.[8] Federal courts developed that analysis chiefly[9] under Title VII of the 1964 Civil Rights Act which prohibits sex discrimination in employment.[10] While the legislature modelled Montana's remedial statute on Title VII,[11] the constitutional authorities for the two acts radically differ.[12] Moreover, on the two occasions when the Montana Maternity Leave Act has faced challenges in Montana courts, the cases have turned on analysis of federal law.[13] The Montana judiciary and bar have thus not yet seized the opportunity to develop an analytical framework for sex discrimination in employment that wholly reflects Montana's

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services for women of the state and as a planning agency for the development of those services; (7) encourage women's organizations and other groups to institute local self-help activities designed to meet women's employment and related needs; (8) apply for and receive grants, appropriations, or gifts from any federal, state, or local agency, private foundation, or individual to carry out the purposes of this part.

Also originally included in this chapter was the Montana Maternity Leave Act (MMLA), now codified at MONT. CODE ANN. §§ 49-2-310, 311 (1987).

6. By joint resolution in 1973, the legislature instructed an interim subcommittee to study implementation of the equal dignity clause "to achieve equality of the sexes under the law." *Equality of the Sexes*, 43d Mont. Leg., Report of the Subcommittee on Judiciary 1 (1974). (The study is available in the State Library, Helena, Montana.)

7. MONT. CODE ANN. §§ 49-2-310, -311 (1987); see *supra* note 65 for text of statutes.

8. Martinez v. Yellowstone Cnty. Welfare Dep't, ___ Mont. ___, ___, 626 P.2d 242, 245 (1981).

9. Federal discrimination analysis also has developed from equal protection claims (*e.g.*, Craig v. Boren, 429 U.S. 190 (1976)) and anomalously from due process claims (*e.g.*, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974)). In the latter case the court held due process required individual evaluation before imposing required pregnancy leave in order not to burden the "fundamental freedom" to reproduce. *Id.* at 639-40.

10. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e provides at section 703(a), 42 U.S.C. § 2000e-2(a) in relevant part: "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ."

11. *Martinez*, ___ Mont. at ___, 626 P.2d at 245.

12. Congress enacted Title VII under authority of the Commerce Clause of the federal Constitution. *See* J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW, at 659 (2d ed. 1983).

13. Employers argued that federal law preempted the Montana Maternity Leave Act on two occasions: Mountain States Tel. & Tel. Co. v. Commissioner of Labor & Indus., ___ Mont. ___, 608 P.2d 1047 (1980) (federal labor law did not preempt the MMLA) and Miller-Wohl v. Commissioner of Labor & Indus., ___ Mont. ___, 744 P.2d 871 (1987) (*see infra* note 85 for case history) (Title VII did not preempt the MMLA).

unique constitutional mandate of equality and human dignity.[14] The Montana workplace reflects this legal delay. Though Montana women enjoy constitutional guarantees against employment discrimination far more expansive than other American women, Montana women's experience duplicates the low pay and status of the national female workforce.[15]

Under the federal legal analysis, overt barriers to women's full participation in employment are now easily recognized and struck down as unconstitutional or prohibited by statute.[16] Title VII gave federal courts the authority, for example, to invalidate "protectionist" state laws and employer rules specially limiting the number of hours[17] or years[18] women could work. Federal discrimination analysis has proved wholly inadequate, however, in its application to the subtler problems which pregnancy and family obligations raise in the employment setting. To what extent employers may or must accommodate workers' pregnancies or other family obligations remains unsettled under federal law.

Responding to the 1972 constitutional mandate, the Montana Legislature specifically addressed employment "problems confronting women as wives, mothers, homemakers, and workers."[19] In 1975 the legislature enacted the Montana Maternity Leave Act ("MMLA") which requires employers to provide "reasonable" unpaid leave for pregnancy and childbirth and to reinstate workers at the end of the leave.[20] In 1981 a Montana employer challenged the validity of the MMLA in *Miller-Wohl v. Commissioner of Labor*.[21] Federal discrimination analysis collided in *Miller-Wohl* with the MMLA's initiative in addressing the subtler forms of sex discrimination. After six years of litigation reaching up and down both state and federal court systems, the Montana Supreme Court has now spoken the last word on the *Miller-Wohl* case, and upheld the

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14. Previous commentators in these pages have urged such a development. *See* Comment, *Taking New Rights Seriously* and *Equality for Men and Women*, *supra* note 2.

15. *See* discussion *infra* section II of this comment.

16. It is shocking to realize how recently state laws and private employment practices restricting women's participation in the workforce have prevailed. As recently as 1972, for example, the Ninth Circuit Court of Appeals struck down a private employer's enforcement of a California statute limiting the number of hours female employees could work. Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972).

17. *Id.* at 1007.

18. Rosen v. Public Svc. Elec. & Gas Co., 477 F.2d 90, 95 (3d Cir. 1973).

19. MONT. CODE ANN. § 39-7-103(2) (1987) (enacted in 1973).

20. MONT. CODE ANN. § 49-2-310 (1987); *see infra* note 65 for text of statute.

21. ___ Mont. ___, 692 P.2d 1243 (1984), *vacated and remanded*, 107 S.Ct. 919 (1987), *original judgment reinstated*, ___ Mont. ___, 744 P.2d 871 (1987).

MMLA.[22] The resolution of that controversial case, however, yet leaves in limbo the development of a Montana legal analysis capable of effecting the constitutional guarantee of equality and inviolable human dignity.

As a background to the *Miller-Wohl* case, this comment first examines how federal courts have struggled and failed to fit childbearing and childrearing into traditional discrimination analysis. An overview of women's status in the national workforce more than twenty years after enactment of Title VII, and in the Montana workforce more than fifteen years after passage of the state constitution follows. Third, this comment analyzes the clashing legal approaches presented in the *Miller-Wohl* case. Finally, by examining Montana's constitutional dignity clause, this comment suggests a legal analysis of sex discrimination designed to effect Montana's unique constitutional mandate.

I. Federal Sex Discrimination Analysis

In 1950 most American women, including Montana women, were not employed outside the home.[23] Instead, women dominated the traditionally female realm of the home and family life while men dominated the traditionally male realm of employment and public life.[24] Postwar conditions of employment and workplace rules reflect this historical division of the sexes. Employers could assume that a worker's wife maintained the home, freeing the worker from childcare responsibilities. Employers could therefore demand of workers long workday hours and years of service uninterrupted by childbearing and childrearing responsibilities. The

22. *See infra* note 85 for the procedural history of the *Miller-Wohl* case.

23. Mont. Dep't of Labor and Indus., Research and Analysis Bureau, *Montana Women in the 80s* (1985). This publication is the most recent study of Montana women's experience in the workforce. Statistical research for this comment benefited greatly from the assistance of Tom Cawley, Research Specialist, Montana Department of Labor and Industry Research and Analysis Bureau.

24. Historically, the U.S. Supreme Court upheld the validity of state "protectionist" laws restricting women's access to the workplace on the premise that women's domain of the home and men's of the workplace were properly distinct. *See, e.g.*, Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 140-41 (1872) (Bradley, J., concurring) ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization . . . indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood."); Muller v. Oregon, 208 U.S. 412, 422 (1908) (Woman "is so constituted that she will rest upon and look to [man] for protection; . . . her physical structure and a proper discharge of her maternal functions . . . justify legislation to protect her from the greed as well as the passion of man."). The analysis in this comment of the traditional division of the female domain of the workplace drew from Comment, *Childbearing and Childrearing: Feminists and Reform*, 73 Va. L. Rev. 1145, 1150-54 (1987) (authored by John D. Gibson).

workplace standard, that family obligations not interfere with employment, developed in an era when most men were employed and most women were not. The workplace standard thus incorporates a male norm of workers unfettered by childbearing and childrearing responsibilities.

Between 1950 and 1983, women's participation in both the national and Montana workforce jumped from twenty-five percent of women employed to more than fifty percent.[25] These millions of new female workers faced a workplace which, if only by virtue of history, is defined and dominated by the male norm of uninterrupted dedication to employment. Federal discrimination analysis, however, offers little relief to women whose pregnancies or other family obligations challenge the workplace standard that family obligations not interfere with employment. Instead, federal discrimination analysis has focused on the more overt forms of sex discrimination in employment.

Title VII prohibiting discrimination on the basis of sex in employment provides the authority for federal sex discrimination analysis. The U.S. Supreme Court has declared that the purpose of Title VII is to "achieve equality of employment opportunities and remove barriers that have operated in the past" to exclude protected classes such as women.[26] In federal discrimination analysis, then, courts will examine whether an employment practice operates as a barrier to women by discriminating on its face.[27] If the employment practice is "facially neutral," courts will next ask whether the practice results in a "disparate impact" on women as a class and thus operates as a discriminatory barrier.[28] Left unquestioned in this analysis is whether the employment practice itself reflects a historical male norm perpetuating a sex-based division between family life and employment. When analyzed from this perspective, federal sex discrimination cases reveal a commitment to equal opportunity for women only when women are willing or able to perform in the workplace just as men always have.

A. Childrearing Obligations

Both nationally and in Montana, as the percentage of em-

25. *Montana Women in the 80s*, *supra* note 23, at iv.

26. Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

27. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, 15-25 (1976); Corbett, *Proving and Defending Employment Discrimination Claims*, 47 MONT. L. REV. 217, 219-37 (1986).

28. *See* SCHLEI & GROSSMAN, *supra* note 27, at 65-181; Corbett, *supra* note 27, at 237-62.

ployed women has doubled in the past three decades, mothers of young children comprise the fastest growing segment.[29] These new female workers struggle to balance their traditional childrearing obligations with their relatively new employment obligations. The structure of the typical workplace shows little concern for the needs of working mothers. In Montana, for example, fewer than two percent of employers provide any kind of child-care assistance.[30] Fewer than twenty percent of Montana employers offer flex-time options[31] for workers who must arrange job schedules around their children's school hours or doctor's appointments. The conflict between women's childrearing obligations and employment has arisen in the federal courts only in the narrow context of employers denying employment to mothers[32] or firing female workers who marry.[33] These cases illustrate a major blind spot in federal discrimination analysis.

In the 1971 case of *Phillips v. Martin Marietta Corp.*,[34] for example, the employer refused to hire women with preschool children but regularly hired men with preschool children.[35] The U.S. Supreme Court reversed summary judgment in favor of the employer. The Court agreed that an employee's preschool children could pose "conflicting family obligations" impairing the employee's job performance. The employer had failed to establish for summary judgment purposes, however, that such "conflicting family obligations" were more pertinent to a woman's job performance than to a man's.[36] In *Sprogis v. United Airlines, Inc.*,[37] also decided in 1971, the Seventh Circuit Court of Appeals invalidated the employer's policy of firing female cabin attendants who married, while retaining married male attendants.[38] The airline had based its policy on the "belief that . . . stewardesses' work sched-

29. *Montana Women in the 80s*, *supra* note 23 at 3.

30. Mont. Dep't of Labor and Indus., Research and Analysis Bureau, *Montana Fringe Benefit and Wage Information by Occupational Classification*, 1 (1986). This state publication summarizes the results of a Montana employer survey conducted in 1986.

31. *Id.* at 1. Flex-time arrangements permit employees to decide when they will work the number of hours their positions require.

32. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

33. Sprogis v. United Airlines, Inc., 444 F.2d 1194 (7th Cir. 1971).

34. 400 U.S. 542 (1971).

35. *Id.*

36. *Id.* at 542. Note that in a concurring opinion Justice Marshall said he would not have permitted lower court consideration of whether family obligations impinged more on female employees than on male and thus would have strictly construed the "bona fide occupational qualification" exception to Title VII's prohibition on sex discrimination. *Id.* at 545 (Marshall, J., concurring).

37. 444 F.2d 1194 (7th Cir. 1971).

38. *Id.* at 1199.

ules were in conflict with the woman's role in married life."[39] The airline argued further that "[I]f there are women who are able to adjust their family lives to this type of work schedule as readily as married men, United has discovered no reliable technique of selecting them . . . ."[40] The Court of Appeals rejected the employer's argument. The airline, the court said, must indeed develop a criterion other than marriage for selecting female employees if the airline wished to assure employees' family obligations did not conflict with their employment.

At the time they were decided, *Phillips* and *Sprogis* struck significant blows against policies which on their face discriminated against women. Federal discrimination analysis bars the assumption that all women employees have conflicting family obligations such as childrearing. These cases also established, however, the unfortunate precept that employers may lawfully discriminate against employees who do have conflicting family obligations, the vast majority of whom are women. By permitting employers to assert conflicting family obligations as a reason for denying employment opportunities to either sex, the Supreme Court perpetuated a workplace standard based on the male norm that workers are always unfettered by child care responsibilities. Under this male-norm standard, only those female workers without conflicting family obligations may compete equally with men. By meeting the male norm of not having child care responsibilities, individual women gain access to the workplace. As long as women bear primary responsibility for child care, however, a policy discriminating against all those who care for children will discriminate against women as a class.

The *Phillips* and *Sprogis* cases demonstrate how so-called "facially" neutral policies can actually perpetuate the traditional division between the woman's domain of the home and the man's of employment. Federal discrimination analysis assumes that the male norm of the workplace which brooks no interference from employees' family obligations is a gender-neutral standard. Were employment standards truly gender neutral, then equal treatment of the sexes under such standards would achieve equal employment opportunity. Where employment standards even subtly incorporate traditional male norms of conduct, however, equal treatment of the sexes will inevitably result in inequality.

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39. *Id.* at 1207 n.23 (Stevens, J., dissenting).
40. *Id.*

B. Childbearing Obligations

Federal discrimination analysis fails even to recognize the disparate impact that policies discriminating against employees with childrearing responsibilities have on women as a class. Employment policies affecting pregnant workers, on the other hand, have commanded a good deal of recent attention in the federal courts. Through the 1970s, women challenged such employment policies as mandatory pregnancy leaves,[41] loss of employment for pregnancy,[42] and exclusion of pregnancy from employee benefit plans.[43] There should be no question that employment policies adversely affecting only pregnant workers have a disparate impact on women as a class. In a series of hair-splitting opinions,[44] however, the U.S. Supreme Court justified many of these policies under federal discrimination analysis. As in the cases concerning the obligation of childrearing, the Supreme Court blindly applied the male norm of the workplace to uphold the exclusion of pregnancy from the workplace.

In 1973 the Supreme Court decided *Geduldig v. Aiello*,[45] a pregnancy case brought on federal equal protection grounds. California operates a state disability insurance program in which all California workers, public and private, participate through a flat payroll tax.[46] When the *Geduldig* case arose, the California program paid benefits to workers disabled from work for any reason except normal pregnancy.[47] Pregnant workers challenged the state program for denying them equal protection, but the Supreme Court disagreed. The policy was facially neutral, the Court said, and worked no disparate impact on women: "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men not."[48] According to

41. *See, e.g.* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

42. *See, e.g.*, SCHLEI & GROSSMAN, *supra* note 27, at 98 (1979 Supp.).

43. *See* discussion *infra*, section I(B) of this comment.

44. For incisive analysis of the Supreme Court's treatment of pregnancy, see Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 2-8 (1986); Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U.L. REV. 513, 527-31 (1983); Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 REV. L. & SOC. CHANGE 325, 335-51 (1984-1985); Comment, *Childbearing and Childrearing*, *supra* note 24, at 1154-58. There is a good deal of scholarship on the problem of childbearing, childrearing, and sex discrimination. This comment has relied on those articles discussing the *Miller-Wohl* case and the MMLA.

45. 417 U.S. 484 (1974).

46. *Id.* at 487-88.

47. *Id.* at 490-91.

48. *Id.* at 496-97.

this analysis, the program's exclusion of pregnancy was free from invidious discrimination.[49] The court failed to consider, however, whether this "facially neutral" policy was actually premised on a male norm for the workplace. The historically dominant group of workers do not get pregnant and so established the standard of no coverage for pregnancy. Few female workers can meet this male standard since almost all women risk pregnancy. The "facially-neutral" policy identified by the *Geduldig* Court therefore incorporates a male norm which must work a disparate impact on women as a class.

Two years later in *General Electric Co. v. Gilbert*,[50] the Supreme Court relied on its *Geduldig* reasoning to decide a Title VII action.[51] The private employee benefit plan at issue in *Gilbert*, like the public one in *Geduldig*, excluded only pregnancy. The Court held that the *Gilbert* plan worked no disparate impact on women as a class for, as in *Geduldig*, the *Gilbert* insurance plan offered at least as much financial benefit to female workers as to male.[52] The Court further held that the *Gilbert* plan was also facially neutral because, "[p]regnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike . . . ."[53]

The *Gilbert* Court's analysis of pregnancy assured that the traditionally separate home life and work life should not only remain separate but should also remain allocated between the sexes. As long as women present no "additional" risks or problems to the workplace they may enjoy equality with men.[54] The male norm of the no-pregnancy workplace need not yield, however, to peculiarly female obligations such as pregnancy. Peculiarly female obligations—by nature pregnancy and by tradition childrearing—must, under the *Gilbert* analysis, remain relegated to the home life. The *Gilbert* Court seemed to approve this traditional gender-based division of work and family obligations. In reversing the lower court, the *Gilbert* court asserted that Title VII did not mandate pregnancy benefits simply because of the sexes' "differing roles in 'the scheme of human existence.' "[55] Thus women who choose to bear

49. *Id.* at 496.

50. 429 U.S. 125 (1976).

51. *Id.* at 136.

52. *Id.* at 138.

53. *Id.* at 139 (emphasis in original).

54. For analysis of the *Gilbert* Court's characterization of pregnancy as a superfluous addition to the male norm of the worker, *see* Williams, *supra* note 44, at 345-46.

55. *Gilbert*, 429 U.S. at 139, n.17. According to the *Gilbert* Court's analysis, pregnancy

and raise children, according to the *Gilbert* court, assume a role that is inimical to successful employment. Title VII guarantees women equality in the workplace only so far as women are willing or able to perform the traditionally male role of employment just as men always have. Performing that role means conforming to the male norm of relinquishing any family obligations conflicting with employment.

In 1978 and in reaction to the Supreme Court's decision in *Gilbert*,[56] Congress amended Title VII with the Pregnancy Discrimination Act (PDA).[57] The PDA expanded Title VII's express definitions of prohibited sex discrimination to include discrimination on the basis of pregnancy.[58] The PDA assures that courts may not again, as in *Gilbert*, hold that employee benefit plans excluding pregnancy are facially neutral. While the PDA incorporates pregnancy into federal sex discrimination analysis, the analysis remains superficial. The PDA prohibits the exclusion of pregnant workers from existing health insurance or leave benefit plans, but it does not mandate that employers provide these benefits unless they already provide them to nonpregnant workers.[59] Thus under the PDA, pregnancy remains an "additional risk" that women face and men do not in all workplaces where employers fail to provide leave or insurance coverage for any disability. The male norm of uninterrupted dedication to work remains integral to the structure of the national workplace. Female workers with childbearing and childrearing obligations that interfere with employment find no support in federal sex discrimination analysis for their demands for equality in the workplace.

II. The Failure of Federal Discrimination Analysis

In the 1970s, despite the setbacks of *Geduldig* and *Gilbert*, federal discrimination analysis succeeded in eradicating many of the overt barriers women faced in entering the workforce. Title VII

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disability benefits would result in greater insurance benefits for women than for men.

56. California Fed. Sav. & Loan Ass'n v. Guerra, 107 S. Ct. 683, 691 (1987).

57. Title VII of the Civil Rights Act of 1964, § 701, 42 U.S.C. § 2000e(k) (1987).

58. The PDA defined pregnancy as an impermissible ground for discrimination under Title VII, § 703(a), 42 U.S.C. 2000e-2(a), *supra* note 10. The PDA provides in § 701, 42 U.S.C. § 2000e(k) that:

> The terms "because of sex" or "on the basis of sex" include . . . because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

59. *Guerra*, 107 S. Ct. at 693.

legally guarantees that women without childbearing or childrearing responsibilities can compete with men in the workplace. These advances have left largely intact, though, a workplace still premised on a male norm. As the *Sprogis* and *Phillips* cases demonstrate, federal discrimination analysis permits employers to favor workers who can remain on the job for long uninterrupted hours and in the competition for promotion for many uninterrupted years. The very structure of the workplace, therefore, meets the needs only of the male-norm worker unencumbered by childbearing and childrearing responsibilities.

The workplace incorporation of a male norm was not so compelling an issue in the first decade after Title VII's passage when most women had the option to depend on a family member for support. In 1972, the same year Montanans ratified the new state constitution, women's rights activists proposed the federal Equal Rights Amendment. Their first concern properly was to secure for women fundamental constitutional rights and, in employment, the opportunity to work at all.[60] Before two-income families became the rule instead of the exception, federal discrimination law sought to preserve for women the voluntary choice to stay at home in the traditionally-female realm or to enter the traditionally-male realm of the workplace on its own terms.[61]

In Montana too, legislators framed employment equality issues as a matter of women's voluntary choice to enter the workforce. In 1974 when recommending enactment of laws drafted to implement Montana's 1972 constitutional dignity clause,[62] the Subcommittee on the Judiciary emphasized that "throughout the subcommittee proceedings, the legislators responded to the doubts and fears of many citizens by drafting legislation specifically protecting the rights of individuals who wish to assume traditional

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60. *See, e.g.*, Comment, *Taking New Rights Seriously* and *Equality for Men and Women*, *supra* note 2, and Ginsburg, *The Equal Rights Amendment Is the Way*, 1 HARV. WOMEN'S L.J. 19 (1978) for constitutional analysis of women's rights.

61. The ERA and other federal discrimination law did not necessarily question the sex-based distinction between home and workplace or even many assumptions about the differing roles of the sexes in society. Ruth Bader Ginsburg, counsel to the ACLU Women's Rights Project and leading advocate of the ERA noted:

> The ERA is not a "unisex" amendment. It does not stamp man and woman as one . . .; it does not label them the same; it does not require similarity in result, parity or proportional representation. It simply prohibits government from allocating rights, responsibilities or opportunities among individuals solely on the basis of sex.

Ginsburg, *supra* note 60, at 21.

62. *Equality of the Sexes*, *supra* note 6, at 1.

roles in family and society."[63] The subcommittee left no doubt, moreover, that the individual rights so protected were Montana women's to be homemakers. Though the subcommittee recommended redrafting Montana's support laws to provide that wives must also support their husbands, the subcommittee said "support must include the nonmonetary support provided by a spouse as homemaker. The subcommittee intends this provision to effectively neutralize the fear that eliminating sexual distinctions from support laws would weaken the family and force the wife to work outside the home."[64] The Montana Legislature thus envisioned Montana women's equal participation in the workforce as an exercise of personal choice, not economic necessity.

Included in the package of new laws the Subcommittee recommended was the Montana Maternity Leave Act (MMLA) prohibiting employment discrimination on the basis of pregnancy.[65] This provision guaranteed for Montana women remedies against pregnancy discrimination three years before the passage of the PDA offered such remedies to all other American women. The MMLA's pregnancy leave and reinstatement provision,[66] moreover, was an unprecedented subversion of the no-pregnancy male norm of the workplace. For the first time, an anti-discrimination measure forced the workplace to accommodate the exclusively female risk of pregnancy. Nowhere did the legislature express the intent, however, that the male-norm structure of the workplace ought fundamentally to change in order to integrate childbearing and childrearing women. In this respect, and as the subcommittee avowed,[67] the legislature preserved the traditional gender-based di-

63. *Id.* at 3.

64. *Id.* at 6.

65. MONT. CODE ANN. § 49-2-310 (1987) provides:

It shall be unlawful for an employer or his agent to: (1) terminate a woman's employment because of her pregnancy; (2) refuse to grant the employee a reasonable leave of absence for such pregnancy; (3) deny to the employee who is disabled as a result of pregnancy any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by her employer, provided that the employer may require disability as a result of pregnancy to be verified by medical certification that the employee is not able to perform her employment duties; or (4) require that an employee take a mandatory maternity leave for an unreasonable length of time.

MONT. CODE ANN. § 49-2-311 (1987) provides:

Upon signifying her intent to return at the end of her leave of absence, such employee shall be reinstated to her original job or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits, and other service credits unless, in the case of a private employer, the employer's circumstances have so changed as to make it impossible or unreasonable to do so.

66. MONT. CODE ANN. §§ 49-2-310(2) to -311 (1987).

67. *See supra* note 63 and accompanying text for subcommittee's intent.

vision between care for children at home and financial support of the family in employment.

Even as legislators sought to preserve women's option of assuming the traditional homemaker's role, dramatic changes in the economy effectively eliminated that option. Women's participation in the workforce has increased dramatically in the past ten years, and predictions are that ninety percent of today's women will work outside the home.[68] Mothers of young children are the fastest growing segment of female workers, though previously most had exercised the option to stay at home.[69] Pressing financial need prompted most of the influx of women into the workforce. Women's contribution to a two-parent family's income often saves the family from poverty, particularly where, as in Montana, so many men work seasonally.[70] For single mothers, employment does not even prevent poverty. By 1983, women headed up sixteen percent of all U.S. families; seventy-five percent of single mothers with minor children worked; and yet a full third of these families lived below the poverty line.[71] Montana single-mothers' experience again mirrors these national statistics.[72] Women's ability to participate fully in the workforce thus has been transformed in a little over a decade from an issue of personal choice to an issue of economic necessity.

Gone are the days, then, when the homemaker could free the breadwinner to compete in the workforce without interruption for family obligations.[73] If men in fact shared child care responsibilities equally with women, then the male norm of an uninterrupted career would adversely affect the sexes equally. The preservation of the male norm of uninterrupted work in federal discrimination analysis has instead resulted in a workplace segregated along gender lines.[74] One workforce, largely male, still pursues jobs demanding long daily hours and many continuous years of employment

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68. *Montana Women in the 80s*, *supra* note 23, at 4.

69. *Id.* at 3.

70. *Id.* at 13.

71. *Id.* at 86-87.

72. *Id.* at 88-89.

73. As the Montana Supreme Court observed in *Miller-Wohl*, ___ Mont. at ___, 692 P.2d at 1246:

> In family households the need for two paychecks spreads across the economic spectrum. Even young upwardly mobile professionals (Yuppies), like a biplane, need two wings working to stay aloft. Economic necessity has converged with the growing insistence of women for equal opportunity in all fields to bring about legislative enactments such as the MMLA.

74. *See* Williams, *supra* note 44, at 333-34 for analysis of the gender-segregated workforce.

uninterrupted by family obligations. The other workforce, largely female, finds jobs flexible enough to accommodate their family obligations only in part-time, low-paying, dead-end, or high-turnover employment.

In 1960 before Title VII was enacted, over seventy-five percent of female workers held traditionally female jobs such as clerical work, nursing, teaching, sales, and other services.[75] In 1983, nineteen years after Title VII's enactment, women's segregation in these traditionally female jobs remained virtually unchanged at about seventy-six percent.[76] Montana women's experience in the same period parallels the national experience.[77] In 1980, about ninety-five percent of the national male workforce and eighty-five percent of the Montana male workforce worked full-time. Of the female workforce, on the other hand, eighty percent nationally was employed full time and only sixty-two percent of the Montana female workforce was employed full time.[78]

Not surprisingly, the pay differential between men and women reflects this segregation of the workforce. For the past thirty years, American women's median income in proportion to men's has remained unchanged at about sixty percent. By 1980, Montana women's median income in proportion to Montana men's was even lower at a scant fifty percent.[79] The segregation of the workforce along gender lines clearly reflects men's and women's disproportionate responsibility for child care.[80]

Family responsibilities impede women's entry into the workforce as well as their advancement. Between 1950 and 1980 U.S. and Montana unemployment rates for men exceeded rates for women in only one year. Accounting for the disparate unemployment rates was the fact that unlike men, women stepped in and out of the workforce in order to raise children.[81] As of 1982, twenty-six percent of married mothers and thirty-five percent of single mothers did not even seek work—and hence did not show up on unemployment rolls—because affordable child care was unavailable.[82] The conclusion becomes inescapable that as long as women remain primarily responsible for child care, equal employment opportunity for women will remain contingent on their status as

75. *Montana Women in the 80s*, *supra* note 23, at 27.
76. *Id.*
77. *Id.* at 28.
78. *Id.* at 12.
79. *Id.* at v.
80. *Id.* at 13.
81. *Id.* at 19.
82. *Id.* at 60.

mothers or non-mothers. Legal advances such as Title VII, the PDA, and the MMLA have failed to ameliorate the disparate impact a workplace structured on a male norm has on women as a class.

III. THE MILLER-WOHL DEBATE

Legal commentators generally agree that to achieve equal employment opportunity for women, dramatic changes in the workplace designed to accommodate conflicting family obligations must take place.[83] Sincere disagreement arises, however, over what legal analysis can best support these changes. National attention has focused[84] on Montana recently because of a constitutional challenge to the state's ground breaking maternity leave act in *Miller-Wohl v. Commissioner of Labor and Industry*.[85] Montana's MMLA had certainly forced change in the workplace to accommodate the family obligation of pregnancy, but litigants disagreed whether principled legal analysis could justify the change.

A. The Dispute

In 1979 the Miller-Wohl Company fired Tamara Buley instead of granting her a maternity leave to accommodate her pregnancy-related disability.[86] In its appeal to the Montana Supreme Court, Miller-Wohl did not dispute that by firing Buley it had violated the MMLA. Rather, Miller-Wohl argued that the PDA preempted

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83. *See, e.g.*, Krieger & Cooney, *supra* note 49, at 519; Williams, *supra* note 44, at 377-78; Comment, *Childbearing and Childrearing*, *supra* note 24, at 1179-82.

84. Recent law review publications addressing the *Miller-Wohl* case include: Kay, *supra* note 44; Krieger & Cooney, *supra* note 44; Williams, *supra* note 44; *Childbearing and Childrearing*, *supra* note 24.

85. ___ Mont. ___, 692 P.2d 1293, *vacated and remanded*, 107 S. Ct. 919 (1987), *original judgment reinstated*, ___ Mont. ___, ___ P.2d ___, 44 St. Rptr. 1718 (1987). The case has a complicated procedural history. After losing the administrative hearing in the Department of Labor and Industry, Miller-Wohl sought declaratory judgment relief in federal district court. Miller-Wohl Co. v. Commissioner of Labor & Indus., 515 F. Supp. 1264 (1981). District Court Judge Paul Hatfield denied Miller-Wohl relief. *Id.* at 1268. Miller-Wohl appealed. *Miller-Wohl*, 685 F.2d 1088 (9th Cir. 1982). The Ninth Circuit Court of Appeals held that federal courts lacked jurisdiction in the matter. *Id.* at 1091. Miller-Wohl next filed its appeal of the administrative ruling in state district court, which held for Miller-Wohl. The Commissioner of Labor and Industry and claimant Buley appealed the decision to the Montana Supreme Court. Miller-Wohl v. Commissioner of Labor and Indus., ___ Mont. ___, 692 P.2d 1243 (1984). When the Montana court reversed the district court, Miller-Wohl appealed to the U.S. Supreme Court. The high court vacated the Montana court's judgment and remanded the case for further consideration. 107 S. Ct. 919 (1987). The Montana Supreme Court then reinstated its earlier judgment and also awarded claimant attorney fees. *Miller-Wohl*, ___ Mont. ___, 744 P.2d 871 (1987).

86. *Miller-Wohl*, ___ Mont. at ___, 692 P.2d at 1245-46.

the MMLA and that the company was in compliance with the less stringent requirements of the federal law.[87] Further, Miller-Wohl argued that the MMLA violated the equal protection clause of the fourteenth amendment by excluding men and nonpregnant women from the preferential leave mandated for pregnant workers.[88] The company's personnel rules provided comprehensive disability leaves for both sexes upon the completion of a year's employment and the rules were therefore gender-neutral. Miller-Wohl claimed that if forced to comply with the MMLA and grant maternity leaves to pregnant workers like Buley within the first year of their employment, the company would have to discriminate unlawfully against all men and nonpregnant women who did not qualify for disability leaves until the second year of their employment. It was impossible to comply with the MMLA, then, without violating the PDA by indeed discriminating among workers in employment benefits on the basis of pregnancy.[89]

Miller-Wohl's appeal before the Montana Supreme Court provided a heated forum for advocates of different legal analyses in achieving employment equality.[90] Nine *amici curiae* headed up by the American Civil Liberties Union agreed that the MMLA unlawfully mandates preferential treatment of pregnant workers.[91] The ACLU *amici* recognized that facially-neutral no-leave policies such as Miller-Wohl's could have a disparate impact on female workers since only female workers risk pregnancy disability.[92] Of greater danger to employment equality, however, is the sanctioning of preferential or special treatment for pregnant workers. "Distinctions based on pregnancy," the ACLU *amici* observed, "share the disadvantage of other sex-based distinctions. They are inherently dangerous, tending to perpetuate the stereotype of women's primary role and function as childbearer, not as wage earner."[93] The ACLU *amici* warned that unless the court embraced the principle of achieving employment equality through equal treatment of the

87. *Id.* at ____, 692 P.2d at 1248-49.

88. *Id.*

89. *Id.*

90. For classification of the litigants' approaches this comment relies on Williams, *supra* note 44.

91. Brief of Amici Curiae American Civil Liberties Union, et al. at 1, Miller-Wohl Co. v. Commissioner of Labor & Indus., ____ Mont. ____, 692 P.2d 1243 (1984). The American Civil Liberties Union represented itself, the ACLU of Montana, the National Organization for Women, the Montana State NOW, the NOW Legal Defense and Education Fund, the League of Women Voters of the United States, the League of Women Voters of Montana, the National Women's Law Center, and the Women's Legal Defense Fund.

92. *Id.* at 30-31.

93. *Id.* at 13-14.

sexes, the court would give new life to the old protectionist legislation which for so long barred women's entry into the workforce.[94] Instead, the ACLU *amici* proposed that the court exercise its authority to bring the MMLA into compliance with Title VII by recasting the MMLA's mandate for reasonable disability leaves in gender-neutral terms.[95] By extending the opportunity for disability leave to all workers, the court could preserve the legislature's intent to assure pregnant workers necessary leave, but achieve that goal without discriminating against nonpregnant women and men.[96]

The Commissioner of Labor and Industry,[97] the complainant herself, and three separate *amici*,[98] on the other hand, argued that the PDA did not preempt the MMLA. Congress did not intend to "occupy the field" of civil rights legislation and therefore any state legislation consonant with the purpose of Title VII must stand. Facially-neutral policies denying disability leave to all workers do impose a disparate impact on female workers because they alone face the risk of pregnancy. The MMLA is therefore consonant with the purposes of Title VII since it protects female workers from the disparate impact of facially-neutral no-leave policies like Miller-Wohl's.[99] Finally, these litigants argued, even if the MMLA accords preferential or "special" treatment to a gender-based class, the fourteenth amendment does not bar such treatment. The legislature identified and protected an important state interest—the right to bear children without loss of employment—when it enacted the MMLA. Thus, the MMLA's gender-based classifications can pass the constitutional test of showing a substantial relationship to an important state interest.[100]

Miller-Wohl's appeal to the Montana Supreme Court served as a new forum for the long-raging debate on how best to achieve equality in employment. Advocates of equal treatment of the sexes like the ACLU *amici* would extend leave policies to include disability and family leave for both sexes. Under a universal disability leave policy, neither the female wage earner's pregnancy nor the

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94. *Id.* at 14.

95. *Id.* at 33.

96. *Id.* at 34.

97. At the time Buley filed her complaint, the Department of Labor and Industry accepted and processed complaints under the MMLA. In 1983 the legislature moved MMLA administrative authority to the Montana Human Rights Commission.

98. The other amici were the Montana Human Rights Commission, the Women's Law Section of the Montana State Bar, and the Montana Education Association.

99. *Miller-Wohl*, ___ Mont. at ___, 692 P.2d at 1248.

100. *Id.*

male wage earner's sex-based disability would threaten the family's livelihood. Moreover, because under the equal treatment approach no law stereotypes either parent as primarily responsible for child care, both sexes are free to exercise progressive employment practices such as flex time to care for their children.[101]

Critics of the equal treatment approach identify reproductive freedom as the core issue in their disparate impact analysis. Of course both sexes face disabilities unique to their sex and hence no-leave policies adversely affect both sexes' participation in the workforce. The telling comparison is not between sex-based disabilities, however, but between the consequences to each sex of deciding to reproduce. Only women face termination from employment and other adverse employment practices as a result of their decision to reproduce, i.e., as a result of pregnancy.[102] Legislation such as the MMLA merely assures through special treatment of pregnancy that neither sex faces discrimination as a consequence of exercising his or her constitutionally protected right to reproduce.[103]

B. The Court Resolution

Justice John Sheehy, writing for a unanimous Montana Supreme Court, conscientiously weighed each of the litigant's positions, noting that "Sorting out the legal issues in this case is like walking through a hall of mirrors, so many facets are presented . . . ."[104] The court essentially agreed with the approach of the litigants who argued that the PDA does not preempt the MMLA. The MMLA effected the purpose of Title VII and the PDA by preventing disparate impact discrimination against women. Miller-Wohl's no-leave policy worked an impermissible disparate impact on women because, by risking pregnancy, women faced grounds for termination which men did not.[105] This finding paved the way for the court's equal protection analysis as well. The court denied that the MMLA conferred preferential treatment on pregnant workers. Instead the court held that:

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101. *See* Williams, *supra* note 44, at 367-68 for this analysis of the equal treatment approach.

102. *See* Kay, *supra* note 44, at 33-35, for this analysis of the special treatment approach.

103. "[T]here is a right 'to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'" Cleveland Bd. of Educ. v. LaFleur, 414 U.S., 632, 640 (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

104. *Miller-Wohl*, ___ Mont. at ___, 692 P.2d at 1252.

105. *Id.*

> [B]y removing pregnancy-related disabilities as a legal grounds for discharge from employment, the MMLA places men and women on more equal terms. All workers, male or female, disabled for any reason other than pregnancy are still treated identically . . . . The MMLA merely makes it illegal for an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role.[106]

The Montana Supreme Court thus used the *Gilbert* court's analysis in reverse. Both courts viewed pregnancy as an "additional risk" women bring to the workplace. The additional risk of pregnancy justifies neither an additional benefit of insurance coverage under *Gilbert*, nor an additional burden of loss of employment under the Montana court's analysis. Analytically, the MMLA merely forces accommodation of the exception of pregnancy in a workplace defined by the male norm of no pregnancy. According to the *Miller-Wohl* court, accommodating the exception of pregnancy assures pregnant workers equal, not preferential, treatment. Seemingly uneasy nonetheless about claims of preferential treatment under the MMLA, the Montana court urged in its conclusion that the upcoming legislature seriously consider the ACLU *amici*'s proposal to redraft the MMLA to mandate leave for all disabled workers.[107]

Miller-Wohl appealed the Montana Supreme Court's decision to the U.S. Supreme Court in 1985. In January of 1987, the high court remanded the case to the Montana court for further consideration[108] in light of its January decision in a closely-related case, *California Federal Savings & Loan Association v. Guerra*.[109] In *Guerra* the employer challenged the validity of a California statute mandating that employers provide pregnancy disability leave and requiring reinstatement upon completion of the leave.[110] Just like Miller-Wohl, Guerra's employer charged that the PDA preempted the California statute so similar to Montana's and that the federal equal protection clause invalidated the statute. Justice Marshall's reasoning in upholding the California statute closely parallels Justice Sheehy's in upholding the MMLA. The PDA does not preempt any state legislation such as the California leave statute which is consonant with the purpose of Title VII.[111] States are free to man-

106. *Id.* at 1254 (quoting Miller-Wohl Co. v. Commissioner of Labor & Indus., 515 F. Supp. 1264, 1266 (1981), *rev'd on other grounds*, 685 F.2d 1088 (9th Cir. 1982)).

107. *Miller-Wohl*, ___ Mont. at ___, 692 P.2d at 1255.

108. Miller-Wohl Co. v. Commissioner of Labor & Indus., 107 S. Ct. 919 (1987).

109. 107 S. Ct. 683 (1987).

110. *Id.*

111. *Id.* at 693.

date pregnancy disability leaves, though the PDA has no such mandates, because "Congress intended the PDA to be 'a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.' "[112] State pregnancy disability leave statutes do not violate federal equal protection requirements, moreover, because they "[allow] women, as well as men, to have families without losing their jobs."[113] Finally, even if such statutes do confer preferential treatment on pregnant workers, employers need only extend the same level of disability benefits to all workers in order to comply with both state and federal statutes.[114] Because the *Guerra* decision clearly supported the Montana Supreme Court's earlier judgment, the Montana court reinstated that judgment in October, 1987.[115]

IV. Unsettled Issues in Federal Discrimination Analysis

The decisions in *Guerra* and *Miller-Wohl*, though at the center of recent debate, have by no means resolved how legal analysis may most effectively support eradication of sex discrimination in employment. Indeed, recent U.S. Supreme Court decisions point up the inadequacy of both the equal treatment and special treatment approaches in achieving equal employment opportunity for the vast majority of working women, working mothers. Both analyses focus on how working mothers can fit, by equal or special treatment, in a workplace defined by male norms. Neither legal analysis therefore compels the fundamental workplace structural changes required to integrate female as well as male norms into the workplace.

Two U.S. Supreme Court cases reflecting on pregnancy disability illustrate how both approaches fail in this regard. In the 1983 case of *Newport News Shipbuilding & Dry Dock Co. v. EEOC*[116] the Supreme Court struck down a provision in an employee insurance plan that excluded from coverage the pregnancies of employees' wives. While female employees received pregnancy benefits under the plan, male workers received no such benefits for their wives. Female employees' husbands received full medical coverage, but male employees' wives did not. The court held that the insurance plan discriminated against male employees by depriving them

112. *Id.* at 692 (quoting California Fed. Sav. & Loan Ass'n v. Guerra, 758 F.2d 390, 396 (1985)).
113. *Guerra*, 758 F.2d at 694.
114. *Id.* at 694-95.
115. *Miller-Wohl*, ___ Mont. ___, 744 P.2d 871 (1987).
116. 462 U.S. 669 (1983).

of the full spousal coverage that female employees received. By enacting the PDA and "making clear that an employer could not discriminate on the basis of an employee's pregnancy, Congress did not erase the original prohibition [in Title VII] against discrimination on the basis of an employee's sex."[117]

How the Court could distinguish analytically between male employees' claims to equivalent spousal coverage in *Newport News* and male employees' potential claims for equivalent leaves under a preferential statute such as the MMLA or California's in *Guerra* is difficult to perceive. The *Newport News* Court seemed to suggest that the permissable method for assuring equal protection for all workers is to extend now special pregnancy benefits to all workers. The Montana Legislature should therefore extend the MMLA's leave benefits to all disabled workers, just as the *Miller-Wohl* court recommended.[118]

The *Newport News* case also illustrates, however, the vulnerability of a special treatment approach on either Title VII or equal protection grounds. Under the authority of the PDA and state childbearing disability laws, courts now recognize that employment policies excluding childbearing work a disparate impact on women. No compelling statutory authority yet exists, though, on which female employees responsible for child*rearing* can base a claim of disparate impact. Though women are in fact disproportionately responsible for childrearing, nothing biologically compels this division of responsibility. Thus courts may freely conclude that employment policies adversely affecting workers with childrearing responsibilities are gender neutral. On the other hand, if an employment policy did accommodate working mothers, for example by granting flex time to working mothers, a reviewing court faces two choices. The Court may either strike the policy as violative of Title VII, or it may extend equal protection under the policy to working fathers. Absent statutory authority for protection of childrearing, courts are likelier to strike the accommodating policy rather than to extend it. The special treatment analysis presents a "catch 22."

While equal treatment proponents can hail the *Newport News* decision for its judicial extension of insurance coverage to all workers, the equal treatment approach does not always result in the parity of the sexes *Newport News* achieved. In *Wimberly v. Labor and Industrial Relations Commission of Missouri*,[119] also decided

117. *Id.* at 685.
118. *Miller-Wohl*, ___ Mont. at ___, 692 P.2d at 1255.
119. 107 S. Ct. 821 (1987).

in January of 1987, the Court refused to extend benefits to prevent disparate impact discrimination. In that case, Wimberly's job was filled while she was on pregnancy leave and she could not return to work. Wimberly applied for state unemployment insurance benefits, but was denied on the grounds that her reason for leaving work, pregnancy, was not "directly attributable to the work or to the employer" as state law required.[120] The U.S. Supreme Court upheld the state action, averring that the state law disqualifying Wimberly was gender neutral. "If a state adopts a neutral rule that incidentally disqualifies pregnant claimants as part of a larger group, the neutral application of that rule cannot readily be characterized as a decision made solely on the basis of pregnancy."[121] By using the equal treatment approach, the Court upheld the "facially-neutral" policy of excluding all workers who leave work for non-employment reasons.

The *Wimberly* Court repeated the *Gilbert* court's analytical error. The *Wimberly* Court failed to recognize that a facially-neutral policy adversely affecting pregnant workers has a disparate impact on women. Instead, the *Wimberly* Court myopically focused on whether the state applied the facially-neutral policy to men and women equally. Left unquestioned was whether the facially-neutral policy itself incorporated a male norm, that of not leaving work except for employment-related reasons. When tested against this male norm, women with childbearing and childrearing responsibilities cannot justify their child care absences from work. As long as women remain primarily responsible for child care, the facially-neutral policy condoning only employment-related absences perpetuates the traditional gender-based division of family obligations and employment.

A final complicating issue in choosing between equal treatment and special treatment analysis is the difficulty in distinguishing between their implementation. The *Guerra* court held that California's pregnancy leave requirement merely assured equal treatment so that no worker, male or female, faced discharge as a result of deciding to have a family.[122] Somewhat defensively, however, the *Guerra* court concluded its analysis by stating that even if the pregnancy leave requirement was preferential treatment, the employer could meet equal protection requirements by extending leave to all disabled workers.[123] The *Miller-Wohl* court expressed

120. *Id.* at 824.
121. *Id.* at 825.
122. *Guerra*, 758 F.2d at 694.
123. *Id.* at 694-95.

similar misgivings about whether the MMLA mandated equal or preferential treatment for pregnant workers.[124] Indeed, it is difficult to distinguish legally those policies that protect certain classes against discrimination from those that confer preferential treatment.

The 1981 U.S. Supreme Court case of *Monroe v. Standard Oil* involving provisions of the Universal Military Training and Service Act further illustrates this point.[125] The Universal Military Training and Service Act, like the Montana and California pregnancy leave acts, requires employers to grant military reservists sufficient leave to fulfill their military obligations.[126] Unlike pregnancy leave acts, the military act further requires employers to reinstate reservists to the full status they would have attained had they not periodically left work on military leave.[127] The Act thus ensures reservists advancement in the workforce commensurate with coworkers who do not bear military obligations. In the *Monroe* case, the employer accommodated the reservist's military leave in its work schedule. The reservist claimed that the company should also specially reschedule his work hours so that he could work as many hours and receive the same amount of company pay as his coworkers.

The *Monroe* Court denied the reservist's claim on the grounds that Congress did not intend to require employers to grant reservists "preferential" treatment.[128] In a note to this holding, the Court admitted that the accommodated leave and guaranteed advancement requirements of the Act could themselves be viewed as "preferential" treatment for reservists. The court decided, however, that "This sort of treatment . . . is better understood as protection against discrimination for reserve obligations than as preferential treatment accorded solely because of reserve status."[129] The *Wimberly* Court noted this *Monroe* holding distinguishing between anti-discrimination measures and preferential treatment.[130] By ignoring the disparate impact aspect of the case, however, the Court was able to conclude that if Wimberly received unemployment benefits, she would receive unlawful "preferential treatment."[131] The U.S. Supreme Court has thus determined that far reaching

124. *Miller-Wohl*, ___ Mont. at ___, 692 P.2d at 1255.
125. 429 U.S. 549 (1981).
126. *Id.* at 552.
127. *Id.* at 552 n.3.
128. *Id.* at 561.
129. *Id.* at 561 n.12.
130. *Wimberly*, 107 S. Ct. at 825.
131. *Id.* at 826.

workplace accommodations for military obligations are not preferential treatment, while a modest unemployment insurance accommodation for family obligations is preferential treatment. While it is easy to imagine any number of considerations motivating the court to evaluate military and family obligations differently, the cases evince no consistent legal principle. If there ever were meaningful distinctions between preferential policies and those designed to prevent discrimination, recent Supreme Court cases have thus blurred them.

V. Toward a Montana Discrimination Analysis

A. Judicial Analysis

Since passage in 1972 of the Montana Constitution's dignity clause,[132] the Montana Supreme Court has applied federal discrimination analysis to Montana sex discrimination cases.[133] Developed under the authority of Title VII and the equal protection clause of the fourteenth amendment, federal discrimination analysis fails to recognize the breadth of the guarantees embodied in the Montana constitutional mandate. That mandate prohibits sex discrimination in order to assure equality and human dignity: "The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state, nor any person, firm, corporation, or institution shall discriminate . . . on account of . . . sex."[134] When delegates to the 1972 Constitutional Convention unanimously endorsed this guarantee, they understood that the scope of the prohibition and its synthesis of human rights were unprecedented in American law.[135] The Montana Constitution inextricably fuses the right of equal protection, inviolable human dignity, and freedom from discrimination.[136] By ignoring that fu-

132. Mont. Const. art. II, § 4.

133. Not only has the court adopted Title VII analysis for cases arising under the Montana Human Rights Act (Mont. Code Ann. § 49-2-303; *Martinez*, ___ Mont. at ___, 626 P.2d at 245), but it has also relied on federal constitutional equal protection analysis in its few opportunities to interpret Montana's very different dignity clause. *See, e.g.*, State v. Craig, ___ Mont. ___, ___, 545 P.2d 649, 652-53 (1975); *In re* C.H., ___ Mont. ___, ___, 638 P.2d 931, 939 (1984). In those cases the court has focused narrowly on the phrase "equal protection" which appears in both state and federal constitutions.

134. Mont. Const. art. II, § 4.

135. V Montana Constitutional Convention 1971-72, 1642 & 1646 (1979) [hereinafter Mont. Const. Conv.]. Delegate Mansfield for the subcommittee on the bill of rights explained that even the proposed ERA "would not explicitly provide as much protection as" the Montana dignity clause, and that the clause barred "private as well as public discrimination." *Id.* at 1642.

136. As originally drafted, the clause contained two sentences. The first sentence concerning inviolable human dignity remained unchanged. The second sentence combined the

sion, the Court has effected but part of the constitution's equality and dignity guarantee.[137] The Montana bar must shoulder responsibility for this judicial lapse. In the course of every discrimination action they bring,[138] Montana lawyers should consciously develop the legal meaning of the constitution's equality and dignity clause.[139]

The threshold question in federal sex discrimination analysis is whether an employer treats individuals or classes equally. The question is loaded. Hidden within the seemingly objective federal question is the assumption that a workplace premised on a male norm is gender neutral. The male norm includes the typical workplace standard that employees may advance only through uninterrupted dedication to employment and that family obligations must not interfere with employment. By permitting exclusion of childbearing and childrearing responsibilities from the workplace, this equal treatment standard results inexorably in the exclusion of women as well. The second question in the federal analysis is whether employment policies work a disparate impact on women. Disparate impact analysis has permitted special accommodation of at least childbearing responsibilities in the workplace. This special treatment analysis merely inquires, however, how women can be fitted like square pegs in round holes into a workplace inherently hostile to their disproportionate responsibility for child care. Federal discrimination analysis therefore never reaches the question how the workplace must fundamentally change. To achieve equal employment opportunity, the workplace must not merely accommodate women, but rather must structurally reflect gender-neutral or integrated norms.

Responding to the state constitutional mandate, Montana lawyers should jettison federal discrimination analysis in favor of a Montana analysis free of gender-based standards. The better anal-

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equal protection and anti-discrimination clauses. The convention divided this second sentence into two separate sentences for stylistic and not substantive reasons. VII Mont. Const. Conv., *supra* note 135, at 2477, 2921.

137. The court has focused narrowly on the phrase "equal protection," comparing it to the federal constitutional guarantee. *See supra* note 133.

138. Montana lawyers can develop the additional constitutional basis of their cases even in actions arising under the Montana Human Rights Act (MONT. CODE ANN. § 49-2-303) and proceeding through the administrative remedies. Note that the constitution's dignity clause is self-enforcing. V Mont. Const. Conv., *supra* note 135, at 1644-45.

139. For discussion of developing unique state constitutional provisions, see Collins, *Reliance on State Constitutions: The Montana Disaster*, 63 TEX. L. REV. 1095 (1985); Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985); and American Civil Liberties Union of Montana, *Continuing Legal Education Seminar: Individual Rights and the Montana Constitution* (1986).

ysis would posit what the workplace would be like if historically men had not only enjoyed full participation in the workforce, but had also enjoyed equal responsibility for child care. If the vast majority of workers, including key employees, had conflicting family obligations, the workplace would have developed structurally to integrate those family obligations into norms for workers. It is easy to imagine, for example, a workplace responding to a majority of workers' needs with attached child care centers and comprehensive leave policies for childbirth and sick child care. More imaginative employment policies would include leave to attend children's school activities and leave to participate in community activities.[140] Like military reservists, workers with family obligations would take leave secure in the assurance that they could compete equally for advancement. Indeed, once freed from the status quo as a standard against which to measure equal opportunity, discrimination analysis can envision workplace policies truly integrating the many facets of human experience.

Of course, this visioning process of an integrated workplace in a legal analysis will require consistent guidance from fundamental legal principles. Montana's unique constitutional mandate itself prompts the threshold question for Montana employment discrimination analysis: Does the employer treat individuals and classes with equal dignity?[141] This threshold question incorporates none of the assumptions of the status quo workplace, nor does it stereotype the role of either sex in society. Rather, it returns discrimination analysis to the constitutional premise that human dignity shall not be violated.

Montana lawyers may well have delayed the task of developing the term "dignity" in discrimination analysis because standard legal authorities provide no gloss for the term.[142] The sheer volume

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140. This comment considers workplace changes necessary to integrate childbearing and childrearing responsibilities into norms for workers because the workplace is now premised on a male norm. A fuller exploration of the possibilities under the Montana Constitution's dignity clause would include changes necessary to integrate community responsibilities into norms for workers as well. Reasons for granting leave might then include care for sick parents and friends, rendering aid in a community disaster, and even participation in more usual community activities. Election Day, for example, is a state holiday in Montana. Employers observing this holiday help assure that workers' obligations as citizens in a democracy need not conflict with their obligations as employees.

141. *See* R. Dworkin, *Taking Rights Seriously*, at 227 (1978). This outline for a Montana sex discrimination analysis also draws on the valuable analysis found in Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L. J. 1373 (1986) and in Krieger & Cooney, *supra* note 44, at 536-72.

142. The Constitutional Convention cited only the Puerto Rican declaration of rights as a source for Montana's dignity clause. V Mont. Const. Conv., *supra* note 135, at 1642.

of possible non-legal resources for the term, many of them indigenous to Montana, is daunting. The resources of history, literature, and philosophy,[143] as they seek to describe and value human relations, can perhaps best inform a constitutional understanding of dignity. Any sophisticated analysis of the constitutional term dignity lies beyond the scope of this comment. As a starting point for a new discrimination analysis, however, two features of dignity require notice. First, dignity is an inherent human attribute, independent of a person's role or station in society. Second, dignity is also an attribute of how people relate to one another, becoming manifest when people treat each other with dignity. A standard dictionary definition of dignity supplies these inherent and relational aspects of dignity.[144] The constitution's guarantee of "inviolable human dignity" means at least "inherent nobility and worth" commanding the respect of others.[145] Discrimination analysis, therefore, should inquire whether employers respect workers' inherent nobility and worth.

Under federal sex discrimination analysis, the employer's requirements are the sole measure of workers' worth.[146] In *Sprogis*[147] and *Phillips*,[148] for example, federal courts permitted employers to value workers only for their uninterrupted dedication to employment, according no respect for workers' conflicting family obligations. Because Congress by statute recognizes the value of military service, on the other hand, federal courts insist that employers respect military reservists' obligations. Federal law prohibiting employment discrimination against reservists manifests respect for their service. The Montana Constitution also prohibits discrimination based on human attributes which must command respect from employers. The dignity clause of the constitution recognizes "race, color, sex, culture, social origin or condition, or political or religious

143. For example, Montana resources for elucidating the term might include K. Ross Toole, Chief Joseph, Wallace Stegner, Jeannette Rankin, and Richard Hugo. The dignity clause itself provides some guidance in choosing appropriate resources from the near endless possibilities. Like the clause, sources should themselves accord dignity to "race, color, sex, culture, social origin or condition, or political or religious ideas." MONT. CONST. art. II, § 4. The Constitutional Convention emphasized that the dignity clause did not protect only "mainstream Montana," but instead sought to include all facets of human experience. V Mont. Const. Conv., *supra* note 135, at 1642. Jurists attempting to understand the constitutional import of dignity should therefore look beyond "mainstream Montana" for more all-inclusive standards.

144. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, at 369 (1981).

145. *Id.*

146. Often federal discrimination analysis turns on whether a "bona fide occupational qualification" justifies the employer's sex discrimination under § 703(e) of Title VII.

147. *See* discussion *infra* at section I(A) of this comment.

148. *See* discussion *infra* at section I(A) of this comment.

ideas"[149] as human attributes commanding respect. While none of these attributes may benefit an employer, in Montana they must be valued nonetheless.

When responding to the 1972 constitutional mandate to eradicate sex discrimination in employment, the legislature certainly contemplated more than women's ability to fulfill an employer's requirements. In 1973 the legislature enacted employment policies for women designed to "enable women to contribute to society according to their fullest possible potential."[150] Legislative policy implementing the new constitution thus respects not just women's job performance, but also their inherent worth and value to society as a whole. Indeed, pursuant to this policy, the legislature instructed the Department of Labor and Industry to "direct public attention to critical employment problems confronting women as wives, mothers, homemakers, and workers."[151] These early legislative programs inform Montana's dignity clause with recognition of women's family and societal relations, as well as their employment relations. When recast in gender-neutral terms, the legislature's concern refines the dignity inquiry in Montana employment discrimination analysis: Do employment policies accord people respect for serving as spouses, parents, and homemakers, as well as for serving as workers?[152] When inquiring whether an employer treats a worker with dignity, then, the analysis should reach beyond the workers' value to the employer and embody respect for the worker's contribution to family and community life as well.

The principle of dignity need not await further legislative implementation for use in a Montana sex discrimination action. Suppose, for example, that a female employee misses work in order to care for her sick child and her employer fires her. In almost any job an employee may miss a day of work for his or her own illness. The employee has no express legal right, however, to miss a day of work for his or her child's illness, no matter how serious. Policies sanctioning leave for personal but not family illness reflect the traditional sex-based division of home life and employment. Traditionally the workplace manifested no concern for an employee's sick child since assuredly a homemaker remained responsible for child care. Today, when both parents in a family work or when the family depends on a single parent, policies prohibiting absences for

149. MONT. CONST. art. II, § 4.

150. MONT. CODE ANN. § 39-7-101 (1987).

151. MONT. CODE ANN. § 39-7-101 (1987).

152. Note that these roles are far from all-inclusive. As suggested before, policies should also accord people respect for their service as citizens, neighbors, and friends.

the care of sick children affront human dignity. Montana lawyers should prosecute and Montana courts should recognize the fired employee's cause of action for sex discrimination denigrating her human dignity. Employers must respect the worker's contribution as a parent as well as an employee.

The second constitutional principle for Montana sex discrimination analysis is the guarantee of equal protection.[153] Employers must treat individuals and classes with *equal* dignity. For example, does the MMLA's guaranteed pregnancy leave for women fundamentally satisfy equal protection? As construed by the Montana Supreme Court,[154] statutory pregnancy leave in Montana includes a time after birth when women recover from labor. During this period, new mothers also have the chance to "bond" with their newborns. Because men do not become pregnant, however, men are denied any guaranteed right of leave for a newborn and any right to bond. Equal protection must mandate that new fathers have at least as much opportunity to bond with their infants as new mothers.[155] Again, Montana lawyers should prosecute and Montana courts should recognize the male worker's cause of action for equal rights to employment leave for childbirth and child care.[156]

This proposed Montana analysis of employment discrimination incorporates aspects of both the special and equal treatment approaches. First, and drawing from the special treatment analysis, the Montana inquiry recognizes that equal employment opportunity can be achieved only when the workplace integrates workers' responsibilities for childbearing and childrearing. As long as the workplace fails to integrate these responsibilities, it reflects a male norm which must always be hostile to female workers. Second, and as the equal treatment analysis emphasizes, workplace structural changes for parenting must extend to men and women equally.

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153. MONT. CONST. art. II, § 4.

154. Mountain States Tel. & Tel. Co. v. Comm. of Labor and Indus., ___ Mont. ___, 608 P.2d 1047, 1062 (1980).

155. *See* Comment, *Childbearing and Childrearing, supra* note 24, at 1180 for the source of this analysis.

156. In sum, the proposed Montana sex discrimination analysis proceeds as follows: (1) Does the employer treat workers with equal dignity? That is, does the workplace structure accord respect to workers' family and community obligations as well as to their employment obligations? Moreover, does the workplace assure treatment of the sexes as equals in their family, community, and employment obligations? If not, ask (2) How would the workplace now be structured had workers of both sexes always shared family, community, and employment obligations equally? To guide this visioning of alternatives, ask (3) Does the workplace structure posited in the second step of the analysis accord respect to workers' family and community obligations, as well as to their employment obligations; and (4) Does the workplace structure posited in the second step of the analysis assure treatment of the sexes as equals in their family, community, and employment obligations?

Workplace structures permitting only women to fulfill family obligations perpetuate the sex-based division of home and work responsibilities. As long as women disproportionately assume child care responsibilities, they shall remain disproportionately relegated to marginal employment.

Finally, the proposed Montana analysis frees courts from the overly-formalistic equal treatment/disparate impact analysis which has resulted in so much inconsistency in federal analysis. If instead Montana courts inquire whether the workplace treats men and women with equal dignity, courts may review men's and women's collective experience in the community, the home, and at work. Domination by either sex in either realm then becomes a touchstone for a finding of unlawful discrimination. Notably, the analysis departs from the conventional legal focus on the individual worker's ability to meet the individual employer's requirements. Examined instead are the effects of employment on the entire community of employers, workers, and their families. Montana lawyers should take this collective perspective when developing Montana's equality and dignity clause. While the constitution declares the dignity of the individual inviolable, constitutional analysis must turn on the respect accorded individuals in their *relations* with others. Moreover, the constitutional guarantee of equality demands comparisons of groups, not of individuals. The constitution cannot mandate the equality of any two individuals. Clearly, however, the constitution mandates treating the two sexes collectively as equals. These relational and group aspects of constitutional analysis compel a collective perspective in Montana discrimination litigation.

The workplace status quo reflects neither equality of the sexes nor respect for workers' relations with others. As long as the Montana bar clings to federal discrimination analysis and fails to envision a workplace encompassing both male and female norms, the status quo will prevail and the Montana constitutional imperative will remain frustrated.

B. Legislation

The 1972 Constitutional Convention urged the legislature to enact positive programs eradicating sex discrimination. By 1975 the legislature had responded with passage of the MMLA and the other employment programs for women. Compared to the rest of the nation, Montana took an early lead in statutorily changing the structure of the workplace to promote equal employment opportunity for women. Compared to the nations of the world, however,

Montana and the United States remain quite backward. Among the industrialized nations, only the United States fails to provide comprehensive programs enabling parents of both sexes to share equally and fully in the workplace and in family life.[157] These programs include not only unpaid leave for both parents of newborns and sick children, but also paid parenting leave and government sponsored day care.[158] Such programs are not mere legislative gratuities. Rather, a commitment to eradicating sex discrimination in the workplace compels the enactment of such programs.

It is telling that Congress has provided an affirmative program to assure military reservists (mostly male) both paid leave and full participation in the workplace, and yet has failed so far to enact any such programs assuring the working primary parent (mostly female) the same equal employment opportunity. While Congress will not likely enact such family legislation soon,[159] the U.S. Supreme Court's recent decisions in *Guerra* and *Wimberly* do give states rather free rein to act in the congressional vacuum for the advancement of employment equality. Those decisions recognized the minimal reach of federal anti-discrimination law, and showed great deference to state policies and programs. Now that the Montana Supreme Court has reinstated its judgment in *Miller-Wohl*, the legislature can heed the court's urging to extend the MMLA's unpaid leave provisions to cover all worker disabilities. Moreover, the legislature should strike another blow at the sex-based division between family life and the workplace by extending leave for newborns to fathers. In early 1987 the Minnesota Legislature took the lead from Montana in promoting employment equality when it enacted unpaid leave provisions for both mothers and fathers of

157. *See* Comment, *Childbearing and Childrearing*, *supra* note 24, at 1180.

158. One hundred and twenty-seven nations provide some form of parenting leave. At least ten western nations provide paid leave, including Canada, Japan, and Sweden. Sweden's program encourages parents to divide compensated leave time between them. *See* Krieger & Cooney, *supra* note 44, at 377-78; *Family and Medical Leave Act Summary*, H.R. 925, 101st Cong., 1st Sess., 133 CONG. REC. H527-28 (daily ed. Feb. 3, 1987).

159. Representatives Clay and Schroeder introduced the Family and Medical Leave Act, H.R. 925, 101st Cong., 1st Sess. (1987) in January of 1987. After bipartisan compromise in the house, the Act would require employers of fifty or more employees to provide unpaid family leave for the birth or adoption of a child and for the illness of a child or parent. The Act would also require provision of unpaid medical leave for an employee's own disability. Key employees and employees with less than a year of employment would be exempt from the plan. The Act also authorizes a study of national insurance for paid parenting and disability leave. The exemptions in the Act are too broad (eighty percent of employers), but passage of the Act would be a critical step forward. Proponents of the Act stress hardships on families as the Act's rationale, rather than the necessity of parenting leave for the achievement of equal employment opportunity. *See Family and Medical Leave Act Summary*, *supra* note 158.

newborns or adopted children.[160] Montana should follow Minnesota's new lead. Finally, the legislature should authorize a new subcommittee study of legislation necessary to implement Montana's constitutional equality and dignity clause. The study agenda should at a minimum include examination of comprehensive child care leave programs for parents and an examination of state-subsidized day care. Further, the subcommittee should look at current examples of state-sponsored disability insurance programs for methods of funding paid parenting leave programs and day care programs.[161]

In the session following passage of the 1972 constitution, the legislature established in the Department of Labor and Industry "as an affirmative policy of this State . . . procedures which will enable women to contribute to society according to their fullest possible potential."[162] In the years since passage of this policy, the legislature has enacted the MMLA, the Displaced Homemaker's Program,[163] and most recently an "incentive program" for the provision of day care services to welfare recipients.[164] If the legislature is to maintain its demonstrated commitment to equal employment opportunity for women, it must take the initiative again and enact programs which make equal dignity in employment a Montana reality.

VI. CONCLUSION

The *Miller-Wohl* decision stretches federal discrimination analysis further than it has reached before in attacking a workplace structure inherently discriminatory against women. This further reach also marks the dead end of federal discrimination analysis. The Montana Constitution obliges attorneys to develop a new discrimination analysis, eschewing status quo employment standards in favor of the gender-neutral standards of equality and dig-

160. MINN. STAT. § 181.941 (1987) provides in part:
Sec. 2. PARENTING LEAVE Subdivision 1. SIX-WEEK LEAVE; BIRTH OR ADOPTION. An employer must grant an unpaid leave of absence to an employee who has been employed by the employer for at least 12 months who is a natural or adoptive parent in conjunction with the birth or adoption of a child. The length of the leave shall be determined by the employee, but may not exceed six weeks, unless agreed to by the employer.

161. At least five states now provide disability insurance to all workers. Williams, *supra* note 44, at 379. In Montana where the vast majority of employers are small businesses, state programs can equitably spread the cost of programs necessary to achieve equal employment opportunity.

162. MONT. CODE ANN. § 39-7-101 (1987) (enacted 1973).

163. MONT. CODE ANN. §§ 39-7-301 to -310 (1987) (enacted 1983).

164. MONT. CODE ANN. §§ 39-7-601 to -606 (1987) (enacted 1987).

nity. This comment has suggested only an outline for that new analysis. Montana lawyers have the opportunity to develop that analysis in their sex discrimination cases. If they seize this opportunity, Montana lawyers may not only prevail in new kinds of cases, but they may also point out a new direction for national discrimination sex analysis.